

Gary R. Selvin, State Bar No. 112030
Curtis R. Ogilvie, State Bar No. 111911
SELVIN WRAITH HALMAN LLP
505 14th Street, Suite 1200
Oakland, CA 94612
Telephone: (510) 874-1811
Facsimile: (510) 465-8976
E-mail: gselvin@selvinwraith.com
cogilvie@selvinwraith.com

Attorneys for Defendants and Cross-Defendants
Arthur J. AJG & Co. and AJG-Pipino, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SANTANA ROW HOTEL PARTNERS, LP,

Plaintiff,

v.

ZURICH AMERICAN INSURANCE
COMPANY, ET AL.,

Defendant.

AND ALL RELATED CROSS ACTIONS

CASE NO.: 5:05-cv-00198-JW

**ARTHUR J. GALLAGHER & CO.'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT, OR, IN THE
ALTERNATIVE, PARTIAL SUMMARY
JUDGMENT**

Date: November 26, 2007

Time: 9:00 a.m.

Dept.: 8

Judge: James Ware

Complaint Filed: January 12, 2005

Trial Date: March 12, 2008

(Accompanying Documents: Notice of Motion; Declaration of
Curtis R. Ogilvie, [Proposed] Order)

TABLE OF CONTENTS

	<u>Page(s)</u>
I. PRELIMINARY STATEMENT/RELIEF SOUGHT.....	1
II. STATEMENT OF FACTS	1
A. Background	1
B. The Evidence	2
C. The Pleadings.....	10
III. STATUTORY/CASE LAW AUTHORITY	11
IV. SRHP’S CLAIMS ARE TIME-BARRED UNDER THE APPLICABLE TWO- YEAR STATUTE OF LIMITATIONS	12
A. The “Gravamen” Of All Three Of SRHP’s Causes Of Action Alleged Against AJG Is For Professional Negligence	12
B. Commencement Of The Statute Of Limitations	15
V. CONCLUSION.....	17

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Apple Valley Unified School District v. Vavrinek, Trine, Day & Co.</i> (2002) 98 Cal.App.4th 934	16
<i>Barton v. New United Motor Manufacturing, Inc.</i> (1996) 43 Cal.App.4th 1200	11
<i>Friedman v. Merck & Company</i> (2003) 107 Cal.App.4th 454	13
<i>Hydro-Mill Co., Inc., v. Hayward, Tilton and Rolapp Ins. Associates, Inc.</i> (2d Dist. 2004) 115 Cal.App.4th 1145.....	12, 14, 15
<i>Leeper v. Beltrami</i> (1959) 53 Cal.2d 195	11
<i>Marin Healthcare District v. Sutter Health</i> (2002) 103 Cal.App.4th 861	11
<i>Miller v. Lakeside Village Condominium Assn.</i> (1991) 1 Cal.App.4th 1611	15
<i>Norgart v. Upjohn</i> (1999) 21 Cal.4th 383	12, 15, 16
<i>Seaman's Direct Buying Service, Inc. v. Standard Oil Co.</i> (1984) 36 Cal.3d 752	15
<i>Shamisan v. Atlantic Richfield Company</i> (2003) 107 Cal.App.4th 967	12
<i>Smyth v. USAA Property & Casualty Insurance Company</i> (1992) 5 Cal.App.4th 1470	13
<i>Ventura County National Bank v. Macker</i> (1996) 49 Cal.App.4th 1528	13, 14
<i>West v. Conrail</i> (1987) 481 U.S. 35.....	11
<i>Williams v. Wells & Bennett Realtors</i> (1997) 52 Cal.App.4th 857	13

Statutes

28 U.S.C. § 1332.....	11
California Code of Civil Procedure § 312	15
California Code of Civil Procedure § 337	12
California Code of Civil Procedure § 339	1, 11

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

California Code of Civil Procedure § 366.3	15
Federal Rule of Civil Procedure 56	1

1 **I. PRELIMINARY STATEMENT/RELIEF SOUGHT**

2 The case at bar is an insurance coverage action arising out of an August 19, 2002 fire at the
3 Santana Row project in San Jose, California and brought by Santana Row Hotel Partners (“SRHP”),
4 the developer of a Hotel located within this project.

5 It is uncontroverted that by the end of 2002 SRHP had sustained damages and had full
6 knowledge of the facts upon which it would ultimately allege professional negligence claims against
7 Arthur J. Gallagher & Co. (“AJG”). In December, 2002 the insurer for the project, Zurich American
8 Insurance Company (“ZURICH”) was questioning whether SRHP was afforded certain coverage
9 under a builder’s risk policy; specifically, whether the Hotel had been added to the policy as a Named
10 Insured and thereby covered under the Delay in Completion Endorsement to a policy issued to
11 Federal Realty Investment Trust (“FRIT”). During the ensuing months, ZURICH repeated these
12 concerns during numerous meetings with SRHP representatives. These discussions culminated on
13 September 18, 2003, when ZURICH issued a denial of SRHP’s claim for Delay in Completion
14 coverage for the Hotel.

15 AJG was not named as a defendant until SRHP filed its First Amended Complaint (“FAC”) in
16 November of 2005. All of SRHP’s causes of action against AJG on each cause of action, (1) for
17 Breach of a Third Party Beneficiary Contract, (2) for Fraud, and (3) Breach of Duty. Regardless of
18 appellation, each amounts to a claim for professional negligence with a two-year statute of
19 limitations. As these causes of action accrued in December 2002, more than two years before AJG
20 was named as a defendant, all are barred by the Statute of Limitations embodied in California Code
21 of Civil Procedure § 339.

22 Pursuant to Federal Rule of Civil Procedure 56, AJG seeks summary judgment as to these
23 causes of action.

24 **II. STATEMENT OF FACTS**

25 **A. Background**

26 The Hotel Valencia, which is the subject of this litigation, occupies a portion of a large
27 commercial/retail/residential development in San Jose, California known as Santana Row.

28 On August 19, 2002, a fire at occurred during the construction of Santana Row, causing minor

1 damage to the Hotel. Following the fire, SRHP sought to establish coverage for various direct and
2 indirect losses resulting from the fire, including the alleged delay in opening of the Hotel occasioned
3 by the fire.

4 The dispute between SRHP and AJG in this litigation concerns the availability of Delay in
5 Completion coverage for the Hotel under the policy issued to FRIT by ZURICH, and the question of
6 what representations were made to SRHP concerning this Delay in Completion coverage.

7 **B. The Evidence**

8 Harvey Goodman is President of Goodman Gable Gould and is Executive Vice President of
9 Adjuster's International, President of Rollins Accounting, and a shareholder of FRIT.

10 Mr. Goodman was retained by FRIT and SRHP immediately after the fire to assist them in
11 their insurance claim with ZURICH. He testified that the he learned that there was a coverage issue
12 regarding the Hotel's coverage under the ZURICH policy issued to FRIT in November or December
13 2002, when Jack Healy, ZURICH's Executive General Adjuster, raised the issue. Mr. Goodman
14 emphatically testified there was little question that ZURICH was not extending coverage for certain
15 of SRHP's claims:

16 Q. At the time Goodman-Gable-Gould was engaged by Santana
17 Row Hotel Partners, did you have any reason to believe that there was
18 going to be a coverage issue or a problem with coverage under the
19 Zurich builders risk policy for Santana Row Hotel Partners?

20 A. No. As of the date we were retained, we were not aware of any
21 issue with coverage.

22 Q. When did you first become aware of any issue with coverage for
23 Santana Row Hotel Partners?

24 A. Several months later.

25 Q. And what was the first inkling that there was a question
26 regarding coverage by Zurich under the Builders Risk policy?

27 A. We had biweekly meetings. When I say biweekly, we
28 scheduled meetings every two weeks. It may be because of a Labor
Day holiday or Thanksgiving or Halloween or something, you now,
some kid's basketball game that we couldn't schedule it, that it would
be every three weeks. We tried every two weeks to have a meeting
with Jack Healy and I. There was another gentleman working for
Zurich at the time, Lee Christmann, who attended all the meetings early
on. Dan Fabian or Chris Reath (phonetic) attended some of them.
Dawn Becker attended most of them. **And at one of those meetings in**

1 **the late fall/early winter Jack raised the issue that there was a**
2 **coverage issue. That's the first time I recall it becoming an issue.**

3 Q. Can you be any more specific with respect to a time frame?

4 A. I don't know the exact date. **I want to say it was sometime in**
5 **November, December of '02.**

6 Excerpts of Deposition of Harvey M. Goodman, ("Goodman Depo.") attached as Exhibit A to
7 Declaration of Curtis R. Ogilvie ("Ogilvie Decl.") at pp. 29:7-30:16; **emphasis added.**

8 Specifically, Goodman recalls that on December 19, 2002, ZURICH began questioning
9 whether SRHP was insured under the policy. He testified that he told SRHP that same day that
10 ZURICH was questioning coverage:

11 Q. You mentioned earlier that you became aware at some point that
12 Zurich was questioning whether or not Santana Row Hotel Partners was
13 insured under the policy. Do you recall that testimony?

14 A. Yes.

15 Q. You believe that occurred sometime in late November, early
16 December, correct?

17 A. I believe but I'm not certain that that's exactly...

18 Q. Can you give me some context as to when and how that
19 information was relayed to you?

20 A. I believe Jack Healy communicated that to me. I can't tell you
21 for sure but I think I testified earlier **I thought he did it at one of our**
22 **biweekly meetings.** Whether it was in Rockville or California I
23 couldn't tell you for sure but we had discussed and we had provided
24 him the certificate of insurance. I think you have a document where
25 Tony D'Amico supplied him one but I thought we had supplied it to
26 him earlier but maybe that's the only time we supplied it to him. And
27 he said that he – Zurich didn't have a record of that. I was a little
28 surprised. That's what – I remember him communicating that to us.
I'm pretty sure it was verbally.

29 Q. Zurich communicated to you that they didn't think that Santana
30 Row Hotel Partners was covered under the builders risk policy, correct?

31 A. I didn't think he said that. Jack is very careful in how he
32 chooses his words. Jack would have said – he wouldn't have said they
33 are not covered, **he would have said we are not acknowledging they**
34 **are covered.**

35 Q. **That's significant for your client, Santana Row Hotel**
36 **Partners, isn't it?**

37 A. Yes.

1 Q. The carrier is saying, hey, we are not acknowledging that
2 they are insured under out policy, isn't it?

3 A. Yes.

4 Q. And that was communicated to you in late November/early
5 December 2002, correct?

6 A. I believe that's when it was.

7 Q. Did you advise your client, Santana Row Hotel Partners, of
8 that important development?

9 A. I believe we did, yes.

10 Q. When did you advise them of that?

11 A. I don't recall exactly. Probably that day. Probably would
12 have picked up the phone and called them.

13 (Goodman Depo. pp. 115:6-117:12; **emphasis added.**)

14 Goodman testified that ZURICH's questioning of SRHP's status under the FRIT policy was
15 expressed at meetings held during December of 2002:

16 Q. I'd like to show you Exhibit 249. Is this a document that
17 Goodman-Gable-Gould prepared?

18 A. It appears to be.

19 Q. This is another agenda for an insurance meeting with Zurich,
20 correct?

21 A. 14 days after the last one.

22 Q. **December 19, 2002?**

23 A. That's correct.

24 Q. Item number 4A asks for copies of insurance policy and
25 declaration page. Why is that on this agenda?

26 A. They probably asked for a copy of declaration which they had
27 their own policy. I'm not sure why but if they asked for something to
28 be put on the agenda, we put it on.

Q. Look at item 4E, status at 8-19-02. What does that refer to?

A. 8-19-02 is the date of loss. So they probably wanted to discuss
the status as of the date of loss.

Q. Status of Santana Row Hotel Partners as an insured as of the
date of loss?

A. That would be my assumption, yes.

1 Q. So, again, it was a question in December whether or not
2 Santana Row Hotel Partners was even an insured under the Zurich
Builders Risk policy, wasn't it, at least from Zurich's standpoint?

3 A. At least from Zurich's standpoint, yes.

4 Q. That was communicated to you, correct?

5 A. Yes.

6 Q. And you communicated that to Santana Row Hotel
7 Partners?

8 A. Yes.

9 (Goodman Depo. pp. 132:2-133:18; **emphasis added**. Exhibit 249, attached as Exhibit B to Ogilvie
10 Decl.)

11 ZURICH's refusal to extend Delay in Completion coverage to SRHP under the FRIT policy
12 continued during meetings held with the SRHP representative through July of 2003:

13 Q. ...Exhibit 395 is Bates numbered ZCS-8198 through 8199. It's
14 an agenda for a Wednesday, April 19, 2003 meeting. Have you seen
this document before?

15 A. It's actually Wednesday, April 9th.

16 Q. Wednesday, **April 9, 2003**. Have you seen this document
before?

17 A. I'm sure I have.

18 Q. Do you believe you attended this meeting?

19 A. I believe I did.

20 Q. Do you know who prepared this agenda?

21 A. Again, same person. These were prepared, I believe, by Bill
22 Greenspan and I with some input from Jack Healy or Dixon Grier.
Anybody that wanted something on here and they told us, we put it on.

23 Q. **Can you read item 4A into the record for me?**

24 A. **"Valencia Hotel. Evidence of other coverage and Zurich
25 proof of coverage."**

26 Q. **What was meant by Zurich proof of coverage?**

27 A. I believe what was meant by **Zurich was still resisting the
coverage** and they were looking for additional documentation.

28 Q. Okay. Mark Number 396. (Goodman Deposition Exhibit
Number 396 was marked for purposes of identification.) This is a

document Bates numbered ZCS-8177-8178. Have you seen this document before?

A. Yes.

Q. Is this a document that Goodman-Gable-Gould prepared?

A. Yes.

Q. That's an agenda for Wednesday, **April 23, 2003**, correct?

A. 14 days after the last meeting.

Q. At this point, as you'll see in item 4A, **Zurich is still asking for support showing that Santana Row Hotel Partners is covered under the builders risk policy, correct?**

A. **Well, they are still asking for evidence of coverage and Zurich's proof of coverage, yes.**

Q. **In fact, Zurich continued to ask for that information for months and months and months after the April 23rd meeting, didn't it?**

Mr. Ellenberg: The question is vague and ambiguous.

A. **Well, we're in a lawsuit, aren't we? They're still looking for this and they haven't found it.**

Mr. Ellenberg: Would you please just answer the question? (Goodman Deposition Exhibit Number 397 was marked for purposes of identification.)

Q. I show you 397, bates numbered ZCS-8647 to 8648. Have you seen this document before?

A. Yes.

Q. Is this a document that Goodman-Gable-Gould prepared?

A. Yes.

Q. As of the Thursday, **May 22, 2003 meeting, Zurich was still asking for proof of coverage** for Santana Row Hotel Partners under the Zurich builders risk policy, correct?

A. **They were asking for additional proof of coverage.**

(Goodman Depo. pp. 148:7-151:8; **emphasis added**. Exhibits 395, 396, and 397 attached as Exhibits C, D, and E to Ogilvie Decl.)

Q. This is a two-page document Bates numbered 12751 to 12752. I'll ask you, Mr. Goodman, apart from the handwriting that appears on this document, have you ever seen this document before?

1 A. Yes.

2 Q. Was this a document that was prepared by Goodman-Gable-
3 Gould?

4 A. Yes.

5 Q. Do you recognize the handwriting on the document?

6 A. I can't say that I do.

7 Q. It is true that as of **June 19, 2003 Zurich was still asking for**
8 **proof that Santana Row Hotel Partners was covered under the**
9 **Zurich builders risk policy?**

10 THE WITNESS: Could you read me back the question?

11 (The reporter read back as requested.)

12 A. **They were asking for additional proof, yes.** (Goodman
13 Deposition Exhibit Number 399 was marked for purposes of
14 identification.)

15 Q. This is a two-page document numbered ZCS 10948 to 10949.
16 Mr. Goodman, have you ever seen this document before?

17 A. Yes.

18 Q. Is this a document that Goodman-Gable-Gould prepared?

19 A. Yes.

20 Q. Did you attend the meeting on Tuesday, **July 1, 2003** referenced
21 in this agenda?

22 A. Yes.

23 Q. Is it true that **as of that date Zurich was still asking for proof**
24 **that Santana Row Hotel Partners was covered under the Zurich**
25 **builders risk policy?**

26 A. **They were still asking for additional proof, yes.**

27 (Goodman Depo. pp. 152:9-154:7; **emphasis added**; Exhibit 399, attached as Exhibit F to Ogilvie
28 Decl.)

29 Q. Is it true that **as of July 16, 2003, Zurich was still asking**
30 **Santana Row Hotel Partners for support for the notion that**
31 **Santana Row Hotel Partners was covered under the Zurich**
32 **builders risk policy** in addition to the two evidence of property
33 insurance forms that were previously provided?

34 A. **Yes.** (Goodman Deposition Exhibit Number 401 was marked
35 for purposed of identification.)

1 Q. Exhibit 401 is also an agenda dated Thursday, July 31, Bates
2 numbered ZCS9477 through 9478.

3 A. Is yours a four-page document?

4 Q. Yes, mine is four pages.

5 A. I'm missing a 79 in between. I've got 77, 78, 80 and 81.

6 Q. These are two different agendas, We'll just keep them as the
7 same Exhibit 401. Are these two agendas contained in Exhibit 401
8 documents that were prepared by Goodman-Gable-Gould?

9 A. Well, one is. The other one's got somebody's handwritten notes
10 on it and I can't tell you whose notes those are.

11 Q. Independent of the handwritten notes, were these both prepared
12 by Goodman-Gable-Gould?

13 A. Independent of the notes, they are the same document.

14 Q. These were the same date? You're correct. My apologies.

15 A. None needed.

16 Q. Is it correct that as of July 31, 2003 Zurich was still asking for
17 documentation other than the two evidence of property insurance
18 forms that were provided to support the notion that Santana Row
19 Hotel Partners was covered under the Zurich builders risk policy
20 prior to the fire?

21 A. Yes.

22 (Goodman Depo. pp. 155:1-156:15; **emphasis added**; Exhibit 401 attached as Exhibit G to Ogilvie
23 Decl.)

24 John Healy, ZURICH's executive general adjustor responsible for the Santana Row loss,
25 corroborated Goodman's testimony from ZURICH's perspective, testifying:

26 Q. Did there come a time when you learned that the owner of the
27 Hotel Valencia at Santana Row was an entity called Santana Row Hotel
28 Partners?

A. Yes.

Q. And when was that in relationship to the fire?

A. I – I don't recall the – the time. It was a couple of months after
the – the date of the loss.

Q. And did you make any attempt to determine whether or not
coverage existed for any losses suffered by the Santana Row Hotel
partners?

1 A. **Yes.**

2 Q. **What did you do to find out whether coverage existed?**

3 Mr. Turner: Calls for a narrative.

4 The WITNESS: **I believe we contacted the underwriter, and he**
5 **indicated that there was no coverage for the hotel.** And then we at
6 one of our meetings with FRIT, we asked them if they had any
7 evidence that there was insurance coverage for the hotel.

8 (Deposition of John Healy (“Healy Depo.”) attached as Exhibit H to Ogilvie Decl., at pp. 37:23-
9 38:17.)

10 Q. **Do you recall who from FRIT that you spoke with about the**
11 **issue of whether or not coverage existed for the hotel?”**

12 A. I know I spoke with Dawn Becker about it and also Harvey
13 Goodman and Tony D’Amico.

14 Q. And do you recall where you – Do you recall whether you
15 spoke with these individuals on more than one occasion about the issue
16 of coverage?

17 A. **Yes.**

18 Q. On how many occasions?

19 A. I don’t recall how many occasions, but **it was usually on the**
20 **agenda for our meetings every two weeks.**

21 (Healy Depo. p. 40:4-15.)

22 Contemporaneous with the above referenced July 31, 2003 meeting, and learning of
23 ZURICH’s continuing refusal to accept coverage for the Hotel, SRHP decided to prepare and tender
24 its claim to ZURICH under the Delay in Completion Endorsement to the policy issued to FRIT.

25 (Exhibit 402 attached as Exhibit I to Ogilvie Decl.)

26 On September 18, 2003, ZURICH issued its denial of SRHP’s claims:

27 Q. Have you seen Exhibit 16 – Let me identify Exhibit 163 first.
28 It’s a document entitled – it’s a letter from – purports to be from Mr.
29 Healy to Ms. Becker dated **September 18, 2003**, ZUR 00146 through
30 ZUR 00154. do you recognize this document?

31 A. Yes, I do.

32 Q. What is it?

33 A. **It’s a denial letter to Federal Realty for the hotel.**

34 Q. And did you author it?

1 A. Yes, sir, with – in conjunction with Jonathan Gross, our outside
2 counsel.

3 Q. And did you perform any investigation into the truth of the
4 statements contained in this letter?

5 Mr. Turner: Objection. Vague.

6 THE WITNESS: I guess to answer your question would be yes.

7 (Healy Depo. p. 161:8-25; Exhibit 163, attached as Exhibit J to Ogilvie Decl.)

8 **C. The Pleadings**

9 In September of 2004, and cognizant that the statute of limitations of its legal remedies was
10 about to expire under the applicable two-year statute of limitations, SRHP obtained from ZURICH an
11 extension of this statute of limitations time (“applicable to the claims asserted against ZURICH”) through January 31, 2005. (Complaint at ¶13.) It never sought an extension from any other party.

12 On January 12, 2005, over two years after Healy had reported ZURICH’s questioning of
13 SRHP’s status under the FRIT policy, SRHP filed its Complaint naming as the sole defendants
14 ZURICH, and Gallagher-Pipino, Inc. (“G-P”) as ZURICH’s agent “for purposes of binding,
15 contracting for and documenting policies of insurance.”

16 On November 30, 2005, nearly three years after Goodman had reported ZURICH’s
17 questioning of SRHP’s status under the FRIT policy, and over three years after the fire, SRHP filed
18 its First Amended Complaint (“FAC,” Document 58) naming AJG as a defendant for the first time.

19 The FAC identified AJG as an entity “retained” by G-P to “place and administer the policy of
20 insurance with respect to the development where the Hotel is located,” and alleged that the claims
21 against GALLAGHER arose out of their alleged failure to comply with their contractual obligations
22 (with ZURICH) and duty to SRHP to insure SRHP for losses resulting from Delay in Completion.
23 The sixth cause of action denominated “Fraud” alleged that GALLAGHER *misrepresented this*
24 *failure* through oral communications and the issuance of three “Evidence of Property Insurance”
25 certificates.

26 The FAC did not set forth any facts alleging the delayed discovery of SRHP’s causes of action
27 against AJG.

III. STATUTORY/CASE LAW AUTHORITY

This Court has exercised diversity jurisdiction over the subject litigation under 28 U.S.C. § 1332. In a diversity action, the district court applies the statute of limitations of the state in which it sits. *West v. Conrail* (1987) 481 U.S. 35, 39.

The statute of limitations to be applied in a particular case is determined by the essence of the cause of action, i.e., the “gravamen” of the cause of action. “The nature of the right sued upon and not the form of the action *not the relief demanded* determines the applicability of the statute of limitations under our code.” *Marin Healthcare District v. Sutter Health* (2002) 103 Cal.App.4th 861, 874-875. (*Emphasis added.*) What is significant for statute of limitations purposes is the primary interest invaded by the defendant’s alleged wrongful conduct. *Barton v. New United Motor Manufacturing, Inc.* (1996) 43 Cal.App.4th 1200, 1207. It is a long-established principle of California jurisprudence that a judicial assessment of the proper statute of limitations requires review “beyond the relief sought and to view the matter from the basic cause of action giving rise to the plaintiff’s right to relief.” *Leeper v. Beltrami* (1959) 53 Cal.2d 195, 214. If the gravamen of the action is held to be a tort, the action though in form stating other causes of action, is subject to the tort limitation. 3 Witkin Cal. Procedure (4th ed. 1996) Actions § 474, p. 599.

California Code of Civil Procedure (“C.C.P.”) section 339 reads in pertinent part:

Within two years: 1. an action upon a contract, obligation or liability not founded upon an instrument of writing, except as provided in Section 2725 of the commercial Code or subdivision 2 of Section 337 of this code; or an action founded upon a contract, obligation or liability, evidenced by a certificate, or abstract or guaranty of title of real property, or by a policy of title insurance; provided that the cause of action upon a contract, obligation or liability evidenced by a certificate, or abstract or guaranty of title of real property or policy of title insurance shall not be deemed to have accrued until the discovery of the loss or damage suffered by the aggrieved party thereunder.

This two-year statute of limitations governs a lawsuit against an insurance broker where the gravamen of the lawsuit is a tort. The limitations period starts to run when the insured sustains appreciable and actual damage, even though the insured continues to sustain damage after the limitations period starts to run. In a professional malpractice context, accrual of the cause of action does not await the plaintiff’s discovery that the facts constituting the wrongful act or omission

1 constitute professional negligence. Once the plaintiff has suffered appreciable harm and knows or
2 suspects that professional misconduct is its cause, the statute of limitations begins to run. *Norgart v.*
3 *Upjohn Company* (1999) 21 Cal.4th 383, 397.

4 The limitations period on the action against the broker is not tolled while the insurer
5 investigates and considers the insured's claim. *Hydro-Mill Co., Inc., v. Hayward, Tilton and Rolapp*
6 *Ins. Associates, Inc.* (2d Dist. 2004) 115 Cal.App.4th 1145.

7 **IV. SRHP'S CLAIMS ARE TIME-BARRED UNDER THE APPLICABLE TWO-**
8 **YEAR STATUTE OF LIMITATIONS**

9 **A. The "Gravamen" Of All Three Of SRHP's Causes Of Action Alleged Against AJG Is**
10 **For Professional Negligence**

11 SRHP's fifth cause of action pled against AJG (Breach of Third Party Beneficiary Contract) is
12 not one immediately resting in or growing out of that written instrument under C.C.P. § 337. There is
13 no evidence of a contract between SRHP and AJG. Instead, SRHP pled a "quasi-contract" cause of
14 action "based upon a contract...not founded upon a written instrument" and accordingly, as specified
15 by C.C.P. § 339(1), subject to the two-year statute of limitations.

16 Both SRHP's sixth cause of action (Fraud) and seventh cause of action (Breach of Duty)
17 against AJG assert that as an insurance broker, AJG did not obtain the coverage requested by SRHP
18 (asserted in the Breach of Duty cause of action), and misrepresented that represented that proper
19 coverage had in fact been obtained (asserted in the cause of action denominated "Fraud"). These
20 claims all arise from a single primary right, and constitute a professional negligence claim.

21 The elements of negligent misrepresentation are well established. A plaintiff must prove the
22 following in order to recover: "[M]isrepresentation of a past or existing material fact, without a
23 reasonable ground for believing it to be true, and with the intent to induce another's reliance on the
24 fact misrepresented; ignorance of the truth and justifiable reliance on the misrepresentation by the
25 party to whom it was directed; and resulting damage..." *Shamisan v. Atlantic Richfield Company*
26 (2003) 107 Cal.App.4th 967, 983. California courts have recognized a cause of action for negligent
27 misrepresentation, i.e., a duty to communicate accurate information where information is conveyed in
28 a commercial setting for a business purpose. *Friedman v. Merck & Company* (2003) 107 Cal.App.4th
454, 477. Liability for negligent representation is imposed only on those who supply information for

1 business purposes in the course of a business or profession: “[M]any familiar forms of negligent
2 conduct may be said to involve an element of ‘misrepresentation’ in the generic sense of that word,
3 but so far as misrepresentation has been treated as giving rise in and of itself to a distinct cause of
4 action in tort, it has been identified with the common law action of deceit,” and has been confined to
5 “the invasion of interests of a financial or commercial character, in the course of business dealings...”
6 *Friedman v. Merck & Company, supra*, 107 Cal.App.4th at pp. 481-482. The basis for liability in
7 misrepresentation by those in the business of providing information is negligence. *Williams v. Wells*
8 *& Bennett Realtors* (1997) 52 Cal.App.4th 857, 864.

9 A cause of action for negligent misrepresentation is barred by the two-year statute of
10 limitations where the allegations amount to a claim of professional negligence. *Smyth v. USAA*
11 *Property & Casualty Insurance Company* (1992) 5 Cal.App.4th 1470, 1476-1478; *Ventura County*
12 *National Bank v. Macker* (1996) 49 Cal.App.4th 1528-1531; 3 Witkin, Cal. Procedure, (4th ed. 1997)
13 Actions, § 576 p.730; *id.* (2007 supp.) § 576, p. 203.

14 In *Smyth*, the plaintiff unsuccessfully tendered his defense in a third party action, and
15 thereafter sued his insurer, alleging that the defendants had falsely stated that no coverage was in
16 effect. The Court of Appeal subsequently sustained the insurer’s demurrer on the expiration of the
17 **two-year** statute of limitation, explaining that both the negligent misrepresentation and bad faith
18 refusal to defend causes of action were based upon the same facts. “[The insured] alleged that [the
19 insurer] repeatedly denied the existence of current policies without exercising reasonable diligence to
20 ascertain the truth of this assertion. The essence of such allegations is that [the insurer] tortiously
21 invaded [the insured’s] property right to be secure from the risk of financial loss. Under the facts
22 alleged, the applicable statute of limitations is...two years.” *Smyth, supra*, 5 Cal.App.4th at pp. 1477-
23 1478.

24 Similarly, in the case at bar, all of SRHP’s causes of action are based upon the same alleged
25 facts, e.g., that AJG breached an obligation to secure insurance coverage for SRHP and subsequently
26 misrepresented this alleged breach. The primary interest invaded by AJG’s alleged wrongful conduct
27 was SRHP’s right to be secure from the risk of financial loss. As in *Smyth*, the nature of the right
28 sued upon (not the form of the action or the relief demanded) sounds in tort and yields a two-year

1 statute of limitations.

2 In *Ventura County National Bank*, a bank sued a group of accountants for negligent
3 misrepresentation, alleging false representations in an audit report of a company's financial
4 statements knowing that the bank would rely upon the report in offering the company a line of credit.
5 In rejecting plaintiff's contention that misrepresentation is a form of fraud (triggering a three year
6 statute of limitation), and concluding that the claims were time barred under the two-year statute of
7 limitations codified in C.C.P. § 339, the Court of Appeal stated "[T]he essence of this cause of action
8 is negligence, not fraud. [The] allegations assert a failure to meet a standard of reasonable care which
9 results in the tortuous invasion of a property right...[¶]...Negligent misrepresentation is born of the
10 union of negligence and fraud. If negligence is the mother and misrepresentation the father, it more
11 closely resembles the mother." The Court held that C.C.P. § 339 barred the action. *Ventura County*
12 *National Bank, v. Macker, supra*, 49 Cal.App.4th at pp. 1529-1531.

13 In *Hydro-Mill Company, Inc.*, an aircraft manufacturer sued its broker, alleging the broker's
14 failure to obtain the insurance coverage requested by the manufacturer constituted a breach of a
15 fiduciary duty and triggered a four year statute of limitations under C.C.P. § 343. In declining to
16 apply this four-year statute, the Court of Appeal reasoned that all theories of liability asserted against
17 the broker were predicated on the same allegations: that the broker "failed to obtain the requested
18 coverage and did not disclose that failure. In short, Hydro-Mill's causes of action, regardless of
19 appellation, amount to a claim of professional negligence. Because a two-year statute of limitations
20 governs that type of claim, (§ 339), Hydro Mill cannot prolong the limitations period by invoking a
21 fiduciary theory of liability." *Hydro-Mill Co., Inc., v. Hayward, Tilton and Rolapp Ins. Associates,*
22 *Inc. supra*, 115 Cal.App.4th at 1159.

23 Similarly, in the case at bar, liability on SRHP's fraud cause of action was based upon AJG's
24 alleged failure to obtain the requested coverage and the subsequent false statements that the proper
25 coverage had been obtained – the very same facts supporting liability on the breach of duty cause of
26 action. Where, as here, a plaintiff alleges that a defendant sought to shield itself from liability by
27 misrepresenting the existence of an insuring agreement, **the action sounds in tort.** *Seaman's Direct*
28 *Buying Service, Inc. v. Standard Oil Co.* (1984) 36 Cal.3d 752, 769.

1 SRHP's transparent inclusion of the fraud cause of action to prolong the two-year statute of
2 limitations (patently applicable to the fifth and seventh causes of action) is as unavailing as plaintiff's
3 similar effort in *Hydro-Mill*. The gravamen of the suit against AJG is AJG's alleged failure to
4 execute its obligations as an insurance broker. The two year period for professional negligence
5 applies to the cause of action denominated "fraud," rendering it, along with the fifth and seventh
6 causes of action, untimely.

7 All of the facts underlying SRHP's allegations of breach of duty subsume all of the allegations
8 for fraud. Liability on all causes of action against AJG are predicated on the same findings: SRHP
9 alleges that AJG failed to obtain the requested coverage and misrepresented that failure. SRHP's
10 causes of action, regardless of appellation, amount to a claim of professional negligence. Because a
11 two-year statute of limitations governs that type of claim, SRHP cannot prolong the limitations period
12 by invoking a fraud cause of action.

13 SRHP learned fairly quickly after the fire, certainly no later than December 19, 2002 that
14 ZURICH was questioning whether they were covered under the builder's risk policy. It knew more
15 than two years before suing AJG of ZURICH's coverage position. Accordingly, SRHP's causes of
16 action against AJG accrued on that date. The statute of limitations on these causes of action expired
17 on December 19, 2004, over 11 months before AJG was named as a defendant in this litigation.

18 **B. Commencement Of The Statute Of Limitations**

19 Civil actions, without exception, can only be commenced within the periods prescribed in
20 C.C.P. §§ 312 to 366.3. The general rule for defining the accrual of a cause of action sets the date as
21 the time "when, under the substantive law, the wrongful act is done, or the wrongful result occurs,
22 and the consequent liability arises. (*Norgart v. Upjohn, supra*, 21 Cal.4th at 397. The infliction of
23 actual and appreciable harm, however uncertain in amount, will commence the statutory period.
24 Neither uncertainty as to the amount of damages nor difficulty in proving damages tolls the period of
25 limitations. *Miller v. Lakeside Village Condominium Assn.* (1991) 1 Cal.App.4th 1611, 1622. In a
26 professional malpractice context, accrual of the cause of action does not await the plaintiff's
27 discovery that the facts constituting the wrongful act or omission constitute professional negligence,
28 i.e., the plaintiff's discovery that a particular legal theory is applicable based on the known facts. If

1 one has suffered appreciable harm and knows or suspects that professional blundering is its cause, the
2 fact that the professional has not yet advised the plaintiff of the mistake does not postpone the
3 commencement of the limitations period. *Norgart v. Upjohn Company, supra*, 21 Cal.4th at p.398,
4 fn.2; *Apple Valley Unified School District v. Vavrinek, Trine, Day & Co.* (2002) 98 Cal.App.4th 934,
5 942.

6 The event giving rise to SRHP's insurance claim – the August 19, 2002 fire – was sudden,
7 brief, and of sufficient magnitude to raise immediate concerns about extensive property damage.
8 SRHP learned fairly quickly after the fire of AJG's potential failure to procure coverage that SRHP
9 believed it was entitled to. By December of 2002, SRHP, through its public adjustor Harvey
10 Goodman, knew that ZURICH was questioning coverage. ZURICH's continuing failures to
11 acknowledge coverage during the ensuing months (*ante* at p.4:7 – p.8:12) were equally well known to
12 SRHP; since Goodman was acting as SRHP's agent regarding the insurance claim, his testimony is
13 sufficient evidence for summary judgment on the statute of limitations regarding all of SRHP's
14 claims against AJG.

15 An exception to the general rule that a cause of action accrues on the date of injury is the
16 "delayed discovery" rule; however, the SAC does not plead any "delayed discovery" facts.

17 Plaintiff need not be aware of "specific facts necessary to establish the cause of action" to
18 trigger the limitations period under the delayed discovery rule. That is a process contemplated by
19 pretrial discovery. Rather, once the "reasonable suspicion of wrongdoing" has triggered the
20 limitations period, and "within the applicable limitations period, he must learn the facts necessary to
21 bring the cause of action in the first place – ***he cannot wait for [the facts] to find him and sit on his***
22 ***rights; he must go find them himself...***" *Nogart* at 398 [Emphasis added.] Moreover, a plaintiff's
23 mere belief that someone has done "something wrong" is deemed sufficient, in and of itself, to alert
24 plaintiff to the necessity of investigation and pursuit of appropriate legal remedies.

25 Under each element of this rule, SRHP had the requisite knowledge or suspicion to commence
26 the accrual of the limitations period in December of 2002. Indeed, Harvey Goodman, who was
27 representing SRHP during ZURICH's claims investigation, testified he not only had knowledge that
28 ZURICH was disputing coverage in December of 2002, but also communicated this information

1 directly to his client (SRHP). Having received actual notice of the facts supporting its claim against
2 AJG in December of 2002, SRHP elected to wait two and a half years to name AJG as a defendant.

3 V. CONCLUSION

4 In September of 2003, SRHP obtained (from ZURICH alone) an extension of time, through
5 January 31, 2005, to file its complaint. It is patently clear that this extension was obtained for one
6 reason: SRHP knew that the statute of limitations was about to expire as to ZURICH. It is equally
7 clear that SRHP had actual notice (through it's representative Harvey Goodman) of the facts
8 supporting a claim of liability against AJG. SRHP's claims against AJG expired in December of
9 2004, six months before AJG was named as a defendant in the First Amended Complaint.

10 Because the gravamen of this lawsuit is AJG's alleged failure to execute its obligations as an
11 insurance broker, the two year statute of limitations period for professional negligence applies to all
12 causes of action irrespective of their denomination. SRHP's failure to file suit against AJG within two
13 years of discovering the facts supporting its allegations against AJG renders the claims against AJG
14 untimely.

15 Accordingly, AJG requests that judgment be entered in its favor and that it be awarded costs
16 of suit and other relief as this Court deems appropriate.

17 Dated: October 15, 2007

SELVIN WRAITH HALMAN LLP

18
19 By: /s/

20 Gary R. Selvin
21 Curtis R. Ogilvie
22 Attorneys for Defendants and Cross-Defendants
23 Arthur J. AJG & Co. and AJG-Pipino, Inc.
24
25
26
27
28